

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR**

21ST CENTURY CYBER CHARTER SCHOOL

Employer

and

Case 04-RC-272006

**21ST CENTURY CYBER EDUCATION
ASSOCIATION, PSEA/NEA**

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The primary issue in this case is whether a public cyber charter school is exempt from the jurisdiction of the National Labor Relations Act (the Act) as a political subdivision under Section 2(2) of the Act. 21st Century Cyber Charter School (the Employer) argues that it meets both parts of the *Hawkins*¹ test used by the National Labor Relations Board (the Board) to determine whether an entity is a political subdivision and thus exempt from the Act's coverage. 21st Century Cyber Education Association, PSEA/NEA (Petitioner), which seeks to represent a wall-to-wall unit of the Employer's professional employees, counters that the Employer meets neither part of the *Hawkins* test and is therefore subject to the Act's jurisdiction.

Should I conclude that the Employer is not a political subdivision under the Act, the Employer nonetheless asks me to decline to assert jurisdiction in this case pursuant to Section 14(c)(1) of the Act, on the grounds that the charter school, among other things, does not sufficiently impact interstate commerce. Petitioner, noting that the Board recently refused to exercise its discretion to decline jurisdiction over charter schools as a class in *Kipp Academy Charter School*, 369 NLRB No. 48 (2020), asserts that there is no rationale for me to deviate from the Board's decisions on this issue.

Lastly, in the event I reject both jurisdictional arguments, the Employer challenges the appropriateness of the petitioned-for unit because four employee classifications—counselors, registered nurses, content developers, and Instruction Systems Design (ISD) technology developers—lack a sufficient community of interest with the teachers, lead teachers, and long-term substitute teachers who the parties agree should be included in any unit found appropriate.

A hearing officer of the Board held a Zoom videoconference hearing in this matter from February 22 through 24, 2021, and both parties filed post-hearing briefs. Having reviewed the stipulations, evidence, and arguments presented by the parties, as well as the applicable legal precedent, I find that the Employer is an employer within the meaning of Section 2(2) of the Act and is not exempt under *Hawkins*. Further, I find that extant legal authority does not support the

¹ *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971).

Employer's request that the Board decline to assert jurisdiction pursuant to Section 14(c)(1) of the Act, and therefore I conclude that the Employer is subject to the Act's jurisdiction. Finally, I find that the petitioned-for unit is appropriate for purposes of collective bargaining because the disputed classifications do not have meaningfully distinct interests apart from the agreed-upon classifications that would warrant their exclusion. Accordingly, I direct an election in the petitioned-for unit.

I. THE JURISDICTION ISSUE

1. Factual Overview

A. The 21st Century Cyber Charter School

The Employer, a public, not-for-profit corporation, operates a public cyber charter school that provides educational services over the internet to approximately 2,424 students who reside in Pennsylvania. From its locations in West Chester and Murrysville, Pennsylvania, the Employer provides students in grades 6 through 12 with an alternative to the traditional "brick and mortar" schooling environment. The school was founded in 2001 upon the collaboration of educators in public school districts in four neighboring Pennsylvania counties: Bucks, Chester, Delaware, and Montgomery. As detailed below, the school operates pursuant to the Commonwealth's Public School Code.

B. Pennsylvania Charter School Law

In 1997, the Pennsylvania legislature amended the Public School Code (PSC)² to permit the establishment of charter schools. Article XVII, known as the Charter School Law (CSL),³ sets forth the process by which a charter school can be established or an existing school can be converted into a charter school. Schools that operate under a charter in Pennsylvania are divided into three types: charter schools, regional charter schools, and cyber charter schools.⁴ As defined by the CSL, a cyber charter school is:

[A]n independent public school established and operated under a charter from the Department of Education and in which the school uses technology in order to provide a significant portion of its curriculum and to deliver a significant portion of instruction to its students through the Internet or other electronic means. A cyber charter school must be organized as a public, nonprofit corporation. A charter may not be granted to a for-profit entity.⁵

In contrast to traditional charter schools which are created by their local school districts, charters to operate cyber charter schools are issued by the Pennsylvania Department of Education

² P.L. 30, No. 14 (1949).

³ 24 P.S. §§ 17-1701-A et seq.

⁴ See generally "*What Is a Charter School?*", <https://www.education.pa.gov/K-12/Charter%20Schools/Pages/What-is-A-Charter-School.aspx>.

⁵ 24 P.S. § 17-1703-A.

(PDE), a Commonwealth agency as defined in the Administrative Agency Law.⁶ The PDE is also charged with assessing and evaluating cyber charter schools to ensure compliance with their own charters and applicable statutes and regulations,⁷ and will renew or revoke their charters as needed.⁸ When a cyber school's charter is revoked, or if its initial application is denied, it can appeal to the Commonwealth's Charter School Appeal Board.⁹

Pursuant to the CSL, a cyber charter school may be established by any of the following: an individual; one or more teachers who will teach at the proposed school; parents or guardians of students who will attend the charter school; any nonsectarian college, university or museum located in the Commonwealth; any nonsectarian, not-for-profit corporation; a corporation, association, or partnership; or any combination thereof.¹⁰

The CSL grants the board of trustees of a charter school authority to decide matters related to the operation of the school, including budgeting, curriculum and operating procedures, subject to that school's charter.¹¹ In addition, the board of trustees has the authority to employ, discharge, and contract with necessary professional and nonprofessional employees, subject to the school's charter and applicable law.¹² The CSL provides that trustees of a charter school shall be deemed "public officials" and that all administrators, including CEOs and other employees who exercise management or operational oversight responsibilities in their positions, shall be deemed a "public official" for the purposes of ethics standards and financial disclosure under prevailing Pennsylvania law.¹³ For purposes of tort liability, employees of a charter school are likewise considered "public employees" and the board of trustees is considered a "public employer."¹⁴

With respect to staffing, the CSL states that the board of trustees shall determine the level of compensation and all terms and conditions of employment of the staff.¹⁵ It further provides that employees of a charter school may organize under the Pennsylvania Public Employee Relations Act but requires that collective-bargaining units at a charter school shall be separate from any collective-bargaining unit of the school district in which the charter school is located, and from any other collective-bargaining unit.¹⁶

As to employee benefits, the CSL provides that all employees of a charter school shall be enrolled in the Public School Employees' Retirement System (PSERS) unless, at the time of the application for the charter school, the sponsoring district or the board of trustees of the charter

⁶ 24. P.S. § 17-1741-A(a).

⁷ 24 P.S. §§ 17-1742-A.

⁸ Ibid.

⁹ 24 P.S. § 17-1743-A.

¹⁰ 24 P.S. §§ 17-1717-A(a) and 17-1745-A.

¹¹ 24. P.S. § 17-1716-A(a).

¹² Ibid.

¹³ 24 P.S. §§ 17-1715-A(11) and (12).

¹⁴ 24 P.S. § 17-1727-A.

¹⁵ 24 P.S. § 17-1724-A(a).

¹⁶ Ibid.

school has a retirement program which covers the employees. In accordance with the CSL, the charter school makes contributions to PSERS and payments to Social Security on behalf of charter school employees.¹⁷

The CSL sets forth requirements and regulations with which cyber charter schools must comply, including provisions for health, safety, attendance, and academic standards.¹⁸ Cyber charter schools must file an annual report and an annual budget with the Commonwealth, and these are subject to audit.¹⁹ Finally, the CSL lists specific requirements and prohibitions for cyber charter schools regarding their communications with school districts, parents, and students.²⁰ If a charter school fails to abide by its duties and responsibilities, its charter can be revoked and its assets retracted by the Commonwealth for distribution for other educational purposes.²¹

C. The Employer's creation and charter

The Employer was founded in 2001 as a public cyber charter school by individuals working as school and intermediate unit administrators²² in Bucks, Chester, Delaware, and Montgomery Counties, Pennsylvania. In around 2000, several school superintendents in those counties began to discuss the excessive costs of cyber charter schools in the area that were being run on a for-profit basis. Believing that a cyber charter school could be operated in a more cost-effective manner using a not-for-profit model, those superintendents and the directors of area intermediate units collectively decided to start a public, not-for-profit cyber charter school. Initially, the founding committee intended that the Employer annually would send rebates to the participating school districts, whose payments would fund the Employer, if collected tuition exceeded the actual costs to educate the students.²³

Following preliminary conversations, the charter application process began. A cyber charter school planning committee was assembled, consisting of the executive directors of the Chester County Intermediate Unit (CCIU), the Bucks County Intermediate Unit (BCIU), the Delaware County Intermediate Unit (DCIU), and the Montgomery County Intermediate Unit (MCIU), and eight superintendents, with input from the 53 other superintendents from school districts within the four counties.²⁴ After the planning phase ended, CCIU drafted the initial school

¹⁷ 24 P.S. § 17-1724-A(c).

¹⁸ 24 P.S. § 17-1749-A.

¹⁹ 24 P.S. § 17-1743-A(f).

²⁰ 24 P.S. § 17-1743-A.

²¹ 24 P.S. § 17-1741-A.

²² According to 24 P.S. § 9-901-A, each school district in the Commonwealth of Pennsylvania is assigned to an intermediate unit, and shall be entitled to the services of the intermediate unit in accordance with a program of services adopted by the intermediate unit board of directors.

²³ Since the school's inception, rebates have never been distributed to participating school districts due to Pennsylvania law changes in 2002 that prohibited charter schools from providing rebates to school districts.

²⁴ Although not formally named members of the committee, all of the remaining superintendents from the four counties provided input.

charter application and submitted it to the West Chester Area School District (WCASD) on November 15, 2000.²⁵ The four intermediate units each contributed \$10,000 toward start-up costs for the school.

The WCASD granted the charter application, with revisions, in February 2001. The Employer began operating during the 2001-2002 school year. The record reflects that the predominant source of the Employer's annual revenue is local education agencies.

The Employer's current charter was granted by the PDE on February 19, 2019, and it is effective through June 30, 2024.

D. The Board of Trustees

The Employer's charter application and bylaws reflect in part how the Employer is governed. According to the Employer's initial bylaws, the Board of Trustees (BOT) shall consist of no less than twelve and no more than seventeen trustees. The executive directors of the Bucks, Chester, Delaware, and Montgomery County intermediate units shall be "ex officio" trustees during their respective terms of office as intermediate unit executive directors. Furthermore, the trustees shall also include eight active superintendents of schools, with two each drawn from Bucks, Chester, Delaware and Montgomery Counties.²⁶ Other trustees shall include one or more parents of children enrolled in the school, and local business and government leaders from southeast Pennsylvania.

Except for ex officio trustees, the trustees, all unpaid volunteers, are elected for terms of three years. The initial bylaws also stated that the BOT shall have the power to remove any trustee, except ex officio trustees, for cause upon a two-thirds vote of the members of the board, as well as fill any vacancies.

In 2020, the bylaws were slightly modified after Delaware County withdrew from the BOT.²⁷ While they continue to provide for no less than twelve and no more than seventeen trustees, they now stipulate that the BOT will consist of the Executive Directors from CCIU, BCIU, and MCIU as ex officio members, nine active superintendents (three from each county), and one or more parents of children enrolled in the school and local business and government leaders from Southeastern Pennsylvania. As of December 17, 2020, the BOT is composed as follows: one local

²⁵ Prior to 2002, cyber charter applications were submitted to local school districts, not the PDE.

²⁶ There is no dispute that intermediate unit executive directors and school superintendents either are public officials or are appointed to their respective positions by public officials.

²⁷ At hearing, Dr. George Fiore, Executive Director of the CCIU and ex officio member of the Employer's Board of Trustees, testified that the new bylaws had already been approved by the PDE. On March 8, 2021, Employer's counsel submitted a letter to the hearing officer, with a copy to Petitioner's counsel, seeking to correct Dr. Fiore's testimony because the Employer in fact has not yet received notification of approval from the PDE. Petitioner has not objected to the Employer's proffered correction to Dr. Fiore's hearing testimony. Consequently, I approve the minor correction, and the record will so reflect.

business representative, two parent representatives, three intermediate unit executive directors, and nine superintendents.

According to the initial charter application, an affirmative vote of a majority of the BOT shall be required to take action on the following subjects: school calendar; textbook selection; appointment or dismissal of charter school administrators; adoption of the annual budget; purchase or sale of land; location or relocation of buildings; assumption of debt; selection of courses of study; designation of depositories for school funds; contractual obligations in excess of \$200; salaries or compensation of administrators, teachers, or other employees of the charter school; and contracts with and appropriations to an intermediate unit, school district, or area vocational technical school for the charter's proportionate share of the cost of services provided by those entities.

When the Employer began operations, it leased space at the CCIU facility, and the CCIU provided business management services, such as payroll, to the Employer. Once the Employer and its budget grew, however, it moved its operations into its own facilities in West Chester and Murrysville. In addition, as recorded in the Employer's 2015 charter renewal application to the PDE:

On July 1, 2014 [the Employer] severed ties with the Chester County Intermediate Unit who provided business office services to [the Employer]. This break was mandated by the Board of Trustees because of a perceived conflict: the Executive Director of the CCIU also serves as a Trustee for [the Employer]. For every year of service provided by the Chester County Intermediate Unit, the local audits were always presented fairly, in all material respects. On July 1, 2014, [the Employer] established its own business office, human resources and payroll functions.

In keeping with the above, Employer witnesses acknowledged that the Employer's BOT owes a fiduciary duty to the Employer. Among those witnesses were Dr. George Fiore, who is presently the Executive Director of the CCIU and therefore an ex officio member of the Employer's BOT; Dr. James Baillie, Executive Director of the CCIU from 1982 to 2007 and former BOT member; and Dr. Joseph O'Brien, Executive Director of the CCIU from 2007 to 2019 and former BOT member. Further, Dr. O'Brien testified that during his tenure and in his capacity as both an Employer BOT member and Executive Director of the CCIU, he would recuse himself from any Employer BOT discussion or action that involved the Employer contracting with the CCIU for the provision of services. Dr. Baillie similarly testified that had any such conflict arisen when he was Executive Director of the CCIU and a member of the Employer's BOT, he would have recused himself.

2. Analysis

A. The Employer is an employer within the meaning of Section 2(2) of the Act

Section 2(2) of the Act explicitly excludes "any State or political subdivision thereof" from the definition of "employer." The term "political subdivision" is not defined in the Act. In *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), the Supreme Court

adopted the Board's test for whether an entity is an exempt political subdivision of a state. Pursuant to this test, an entity is exempt only if it is either: (i) created by a state, so as to constitute a department or administrative arm of the government; or (ii) administered by individuals who are responsible to public officials or to the general electorate. *Hawkins*, supra at 605. Under the first prong, the Board considers whether the entity was "created directly by the state, such as a government entity, legislative act, or public official." *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 8 (2016). With respect to the second prong, the Supreme Court in *Hawkins* ruled that federal law under the National Labor Relations Act, not state law, is controlling in determining whether an entity is a political subdivision and thus not an "employer" subject to the Act. The Court stressed that the Board should examine the entity's actual operations and characteristics when assessing its Section 2(2) status. *Hawkins*, supra at 603-604, adopting the holding of *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62-63 (4th Cir. 1965).

The Employer argues that it is exempt from the Board's jurisdiction under both prongs of the *Hawkins* test. First, the Employer asserts that it was created directly by the CCIU, a government entity, and other public officials, and it is therefore a political subdivision and an administrative arm of the government. On that basis, the Employer seeks to distinguish the instant case from several Board decisions asserting jurisdiction over charter schools. See, e.g., *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB 455 (2012); *Pennsylvania Virtual Charter School*, supra.

The Employer further argues that the second prong of the *Hawkins* test is met because its administration is overseen by the BOT and nearly all of the Board members are individuals answerable to public officials and, by extension, to the general electorate. The Employer highlights the following facts to support its argument. The intermediate unit executive director position is created by statute,²⁸ and each executive director is elected upon a vote of the intermediate unit's Board of Directors who themselves are elected by and from the boards of school directors of the school districts within the intermediate unit. As the school directors of the school districts are elected by the general populace, the Employer argues that the intermediate unit executive directors meet the definition of an individual answerable to public officials or the general electorate. Likewise, according to the Employer, a superintendent is elected into that position by a vote of the board of school directors of the relevant district who, again, are voted into their positions by the general public.

For the reasons that follow, I do not agree that the Employer is a political subdivision exempt from the Act's jurisdiction. On the contrary, I find that the Employer does not meet either of *Hawkins*' two prongs, and accordingly is an employer pursuant to Section 2(2) of the Act.

i. The Employer is Not an Administrative Arm of State Government

The record reflects that the Employer's charter application was submitted by the 21st Century Cyber Charter School Planning Committee, which was made up of the Executive

²⁸ 24 P.S. § 9-913-A(b).

Directors of the CCIU, BCIU, DCIU, and MCIU, as well as eight superintendents from school districts within those intermediate units. Furthermore, the Employer's initial operating funds were received from \$10,000 payments from each of the four intermediate units. The Employer's incorporators were Dr. Baillie, Executive Director of the CCIU at the time, and Ronald Hall, the first Director hired by the Employer. Notwithstanding these facts, there is insufficient evidence establishing that the Employer was formed to constitute a department or administrative arm of the government.

"[A]n entity is not exempt [from the Act's jurisdiction] simply because it receives public funding or operates pursuant to a contract with a government entity." *Pennsylvania Virtual Charter School*, supra, slip op. at 8. Moreover, as the Board further noted in that case, the fact that Pennsylvania statutes describe charter school trustees and administrators as "public officials," designate charter schools as "public employers" for purposes of assessing tort liability, and give charter school employees the right to organize under the Pennsylvania Public Employee Relations Act (PPERA) is not determinative under *Hawkins*.

The record demonstrates that the Employer's BOT is responsible for approving all operational and educational policies of the school, including adopting the annual budget, appointing an auditor and overseeing all financial records, fixing salaries or compensation of administrators and teachers, and many others. There is no evidence that the Commonwealth or any other governmental body has any involvement in setting the operational and educational policies of the school. And even though the Employer's budget is predominantly funded by local education agencies, there is no evidence that those agencies direct or advise the Employer on how to allocate the its budget.

Evidence highlighting the separation between the Employer and other governmental bodies can be found in the Employer's 2015 charter renewal application. There, the Employer notified the PDE that it had severed ties with the CCIU—the intermediate unit listed on the initial charter application—because the Executive Director of the CCIU serves on the Employer's Board of Trustees, thus creating a perceived conflict. As a result of severing ties with the CCIU, as of 2014, the Employer no longer relies on the CCIU for business office services.

Accordingly, I find that the Employer does not meet the first prong of the *Hawkins* test to be deemed a political subdivision.

ii. The Employer is Not Administered by Individuals Who Are Responsible to Public Officials or to the General Electorate

For an entity to be exempt from the Act's coverage under the second prong of *Hawkins*, it must be administered by individuals who are responsible to public officials or to the general electorate. *Hawkins*, 402 U.S. at 605. The key inquiry is whether the composition, selection, and removal of governing board members are determined by law, or instead solely by the employer's governing documents. See *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88, slip op. at 6 (2016); *Research Foundation of City University of New York*, 337 NLRB 965, 970 (2002).

In examining that question, a significant factor is whether public officials' membership on the entity's governing board is not determined by statutory or legal mandate, but solely by the entity's bylaws. See *Research Foundation*, supra (finding significant that the chancellor, president of the Graduate School, and college presidents' membership on the board is not determined by any statutory or other legal mandate, but solely by the employer's bylaws); *Southwest Texas Public Broadcasting Council*, 227 NLRB 1560, 1562 (1977) ("Significantly, both the representation of public institutions on the [e]mployer's board of trustees and the number of trustees appointed by such institutions are determined solely by the [e]mployer's own articles of incorporation...."); *Minneapolis Society of Fine Arts*, 194 NLRB 371, 372 (1971) (finding significant that, even though some trustees held their trusteeships by virtue of their public office, they were "made *ex officio* trustees, not by virtue of any requirement of the State, but rather by virtue of the Society's own articles of incorporation.")

The Employer contends that the executive directors of the intermediate units and the superintendents—which together constitute 12 of the maximum 17 allotted trustee seats on the Employer's governing board—are responsible to public officials and the general electorate by virtue of their positions. In other words, because these individuals are elected into positions by other individuals who, on some level, are elected by the general public, the Employer argues that it meets the second prong of the *Hawkins* test. I do not agree.

As with the cases cited above, the intermediate unit executive directors and superintendents are members of the Employer's BOT solely by virtue of the Employer's bylaws. Furthermore, there is no evidence that an intermediate unit or school district has the authority to remove an individual from the BOT. The Employer argues that removal of any of these individuals from their positions as intermediate unit executive directors and superintendents automatically makes them ineligible to serve on the Employer's BOT, thus arguing that a vote by publicly elected officials could impact whether an individual is eligible to serve on the Employer's BOT. However, that argument is belied by the Employer's bylaws, which do not specify that a trustee is automatically ineligible to serve on the BOT because they have been voted out of their intermediate unit executive director or superintendent position—indeed, five BOT seats are allocated for local leaders in Southeastern Pennsylvania, for which they would likely still qualify. The BOT alone has the authority to remove trustees, except for the three *ex officio* members, and to fill trustee vacancies, in accordance with the Employer's bylaws. The trustees, in their capacity as trustees, do not report to any individual who holds any elected office, and they are not responsible as trustees to the general electorate as they are not required to stand for election.

There is also evidence that intermediate unit executive directors are careful not to blur their respective fiduciary duties owed to the Employer's BOT and to their individual intermediate units. Multiple witnesses testified that as an intermediate unit executive director, they have recused or would recuse themselves from any BOT action involving their individual intermediate units due to the inherent conflict of interest. Clearly then, decisions made by Employer BOT members are made with an eye toward the fiduciary duty owed to the Employer. Members are not acting in their capacity as intermediate unit executive directors or school superintendents when undertaking Employer BOT actions, and they are not making decisions based on the interests of their

intermediate units or schools. On the contrary, Employer BOT members make decisions with the Employer's interests in mind, and they are held accountable for those decisions only by the BOT, and no other public official or the general electorate.

Based on the foregoing, I find that the Employer fails to meet the jurisdictional exemption test under the second prong of *Hawkins*. The record establishes that the Employer is not "administered by" public officials, as no individual involved in the Employer's administration is responsible or has accountability to public officials or to the general electorate.

In sum, I find that the Employer is not a political subdivision of the Commonwealth of Pennsylvania under either prong of the *Hawkins* test. The record reflects that the Employer meets the appropriate standard for the Board's jurisdiction and, therefore, I find that the Employer is an employer within the meaning of Section 2(2) of the Act.

B. Extant law requires that I dismiss the Employer's request that the Board decline to assert jurisdiction pursuant to Section 14(c)(1) of the Act

According to Section 14(c)(1) of the Act:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act [to subchapter II of chapter 5 of title 5], decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

In *Pennsylvania Virtual Charter School*, supra, the Board was asked to decline to assert jurisdiction pursuant to Section 14(c)(1) of the Act. Refusing to do so, the Board found that the Pennsylvania Virtual Charter School serves approximately 3,000 students, has an operating budget in the millions of dollars, employs teachers and staff, and purchases products and services in the private sector economy, and therefore could not support its claim that the school did not substantially affect commerce. *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 14. The Board rejected the argument that asserting jurisdiction in that case would supplant state control, characterizing it as simply another way of asserting that the school is a state school, which the Board found it was not. Ibid. As the Board noted, "Pennsylvania law does not *mandate* the establishment of charter schools as a means of fulfilling 'the state's obligation to provide public education'; rather, it permits *others* to establish them as an alternative to the public schools." Ibid. (emphasis in original).

More recently, the Board again refused to decline to assert jurisdiction over charter schools as a class under Section 14(c)(1) of the Act. In *Kipp Academy Charter School*, 369 NLRB No. 48 (2020), the Board specifically "determined not to exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) at this time." Ibid.

Here, the Employer argues that the Board should invoke Section 14(c)(1) and decline jurisdiction because, in its view, the Employer was specifically created and governed by local agencies. According to the Employer, it is the only charter school in the Commonwealth created and governed by public officials, and thus does not have the same impact on interstate commerce as do other Pennsylvania cyber charter schools.

Additionally, the Employer claims that by declining jurisdiction, the Board will ensure uniformity of treatment between the Employer's employees and the employees of the intermediate unit and school districts from which the Employer draws its trustees. On this point, the Employer notes that the PSEA, in an amicus brief filed in *Kipp Academy*, argued that where a state extensively regulates charter schools and extends to charter school employees the same robust collective bargaining protections that it provides traditional public school employees, the Board should decline to exercise jurisdiction over charter school employees.

I find the Employer's arguments to be without merit. As an initial matter, I have already found that the Employer is not a political subdivision of the Commonwealth of Pennsylvania. Accordingly, I afford no weight to the Employer's assertion that it is was created and is governed by public officials.

Further, the parties stipulated that the Employer, during the past 12 months, has received a gross annual revenue in excess of \$1,000,000 and purchased and received goods, supplies, and materials valued in excess of \$50,000 directly from points located outside the Commonwealth. Based upon these facts, the Employer admitted that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Similar to the facts found dispositive in *Pennsylvania Virtual Charter School*, the Employer serves nearly 2,500 students, employs teachers, administrators, and staff, has an operating budget in the tens of millions, and purchases and receives goods, supplies, and materials from directly outside the Commonwealth. Its effect on commerce is obvious.

Lastly, the Employer asserts that the Board should decline jurisdiction on the basis that the PSEA has taken contrary positions regarding the Board's jurisdiction over charter schools. In support, the Employer notes that the National Education Association, along with several state education associations including the PSEA, asked the Board to decline jurisdiction in an *amicus* brief filed in *Kipp Academy*. Again, I find no merit to this argument.

To the extent the Employer is advancing a judicial estoppel argument, "[j]udicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), quoting *Pegram v. Herdich*, 530 U.S. 211, 227 fn. 8 (2000). In *Kipp Academy*, supra, the Board decided not to exercise its discretion to decline jurisdiction over charter schools as a class, without commenting on the arguments presented by the amici curiae. As such, PSEA's argument in *Kipp Academy* did not prevail and, consequently, it cannot be true that Petitioner is advancing a position in this case that is contradictory to a prevailing argument in another matter before the Board. Indeed, by pursuing this petition before the Board, Petitioner is proceeding in a manner entirely consistent with the Board's determination in *Kipp Academy*.

In sum, I reject the Employer's Section 14(c)(1) arguments and find that the Board should not exercise its discretion to decline jurisdiction over the Employer.

II. THE APPROPRIATENESS OF THE PETITIONED-FOR UNIT

1. Factual Overview

A. The Employer's organizational hierarchy

Reporting directly to the Employer's Board of Trustees is the Employer's CEO, currently held on an acting basis by Brian Cote. The CEO has several direct reports, including the Director of Special Education, the Director of Finance (Business Administrator), the IT Director, the Student Support Manager, and the Director of Curriculum, Instructions & Assessment, which is Cote's regular position. In the latter role, Cote oversees a number of individuals, including five direct reports: the Learning Coach, the High School Principal, the ISD Coordinator, the Middle School Principal, and the Administrative Assistant.

The Employer currently employs approximately 184 individuals across both its West Chester and Murrysville locations. About 155 to 160 of those employees work at the West Chester location, and about 25 of those employees work at the Murrysville location. The West Chester location is housed in a 40,000 square foot facility that includes administrative offices, studios where live labs can be conducted, and production studios where content can be created. The Murrysville location, on the other hand, is a much smaller facility.

B. Teachers, lead teachers and long-term substitutes—employees that the parties agree should be included in any unit found appropriate

The Employer employs teachers at both locations, organized into the following departments: math, social studies, English language arts, science, and electives. There is no administrative or departmental distinction between teachers at the West Chester and Murrysville locations; the parties agree that teachers who are employed at both locations are appropriately included in the same unit. Each content-specific department includes high school and middle school teachers.²⁹ Teachers typically work from 7 a.m. to 3:30 p.m.³⁰ and work 37.5 hours per week. High school teachers report directly to the high school principal, and middle school teachers report directly to the middle school principal. Lead teachers report to the assistant principal, who in turn reports directly to the middle school and high school principals.³¹

The Employer's teachers are responsible for the planning and delivery of instruction that meets state-mandated teaching standards, as well as maintaining the assessment records for

²⁹ The middle school includes grades 6 through 8, and the high school covers grades 9 through 12.

³⁰ If a teacher must maintain evening office hours or teach an evening class, that teacher's morning schedule is adjusted to account for the evening hours.

³¹ The record reflects that the school employs one assistant principal, and that individual has reporting responsibilities to both the middle and high school principals.

students and supporting students as academic advisors throughout their learning. Teachers conduct live virtual classes and labs, meet students one-on-one in virtual offices, and tutor students individually and in small groups. Teachers are required to utilize the “Moodle” learning management system that both teachers and students use to access the curriculum.

The Employer prefers that its teachers have a master’s degree in education. According to the current teacher job description, they must maintain a Pennsylvania Instructional I or II Certification, along with statutory clearances relating to criminal record, child abuse history, FBI background check, and employment history. Teachers participate in professional development days which consist of opportunities and trainings in instructional, social, emotional, and special education.

There is no evidence that teachers have ever temporarily filled in for school nurses, school counselors, or ISD technology developers. While there is evidence that multiple teachers have performed content development work for the Employer, either on a part-time basis or during the summer, there is no evidence that a teacher has temporarily substituted for a content developer.

Most teachers are paid according to the 195-day salary schedule outlined in the Employer’s handbook. Lead teachers work 215 days, and their salary schedule is prorated based on the 195-day salary schedule.

C. Employees in the disputed classifications

i. **Counselors**

The Employer employs six counselors, all of whom are full-time employees, with one a long-term substitute. Like teachers, there are counselors located at both locations: one at the Murrysville facility, and the others at the West Chester location. While the Employer’s organizational chart shows counselors reporting directly to the high school principal, at hearing, Brian Cote testified that counselors report to either the high school or middle school principal, depending on their assignment. Counselors, like the rest of the full-time staff, work 37.5 hours per week.

Counselors are responsible for the development of a comprehensive school counseling program. They collaborate with others to meet students’ needs in the areas of academics, career planning, and personal-social development. They assist students with scheduling needs, and monitor student transcripts to ensure students are meeting graduation requirements. If a student pathway change is needed—for instance, if a student would like to begin taking honors classes—counselors assist with the scheduling. They also help students who are dealing with personal issues, such as anxiety or a crisis.

Additionally, counselors have teaching responsibilities. At the middle school level, counselors teach a guidance class that is mandatory for students. The record reflects that counselors who teach this class devote as much as 10 hours of their weekly schedule teaching this course. In the high school, counselors teach a career and college readiness course which is a graduation

requirement, and they devote approximately 10 to 15 hours of their weekly schedule to teaching. In any given year, however, not every counselor teaches these classes.

According to the job description, counselors must have a master's degree in secondary guidance, and experience in a kindergarten through grade 12 school setting is preferred. Counselors must maintain the same statutory clearances as teachers, and they participate in the same professional development opportunities. They must also possess the Pennsylvania certification for school guidance counseling, and, although not required, some of them also hold a valid teaching certificate.

The record reveals that counselors have significant contact with other classifications. Teachers and counselors communicate regarding student scheduling issues, including student pathway changes. Counselors also interact with teachers in the Employer's SOAR program for off-cohort students—such as an 18-year-old in the ninth grade—who have glaring academic needs and need significant social and emotional support. Additionally, like teachers, counselors use the Moodle learning management system, and they interact with teachers when they need assistance navigating the system. According to one counselor who testified at the hearing, he interacts with teachers daily.

Counselors also have contact with the Employer's registered nurses. According to the counselor who testified, he has interactions with registered nurses daily, mostly regarding students with comprehensive 504 learning plans developed by the school to support students with medical disabilities by providing them accommodations. Counselors work closely with the registered nurses to develop these plans, and they work with the students' teachers/academic advisors to monitor how the students are progressing under the plans.

Lastly, counselors have some contact with ISD technology developers, and infrequent contact with content developers. According to the counselor who testified, he interacts with ISD tech developers approximately two times per week, mostly as it pertains to helping with student grades and schedules in Moodle. With respect to content developers, in 2020, Brian Cote instituted weekly departmental meetings whereby all members of a particular department—for example, the math department—met for one hour to discuss issues within the department. Teachers, counselors, ISD technology developers, and content developers involved with the creation of department-specific curriculum all attended and were involved with these weekly meetings. As a result, counselors and content developers frequently interacted. As of the hearing date, these weekly meetings had not occurred in 2021, and so counselors and content developers no longer had frequent contact.

There is no record evidence that counselors have ever temporarily filled in for teachers, registered nurses, ISD technology developers, or content developers.

Five of the school counselors are paid on the Employer's 260-day pay scale, and the long-term substitute counselor is paid according to the 195-day pay scale.

ii. Registered Nurses

There are currently two registered nurses working for the Employer, both of whom work at the West Chester location. Like the lead teachers, the nurses are supervised directly by the assistant principal.

Registered nurses are responsible for ensuring that the Employer is meeting PDE and PSC mandates relative to health screenings and vaccinations. To that end, registered nurses are required to maintain student health records and communicate with parents and students who are either out of compliance or need updated health records.

As part of their job responsibilities, registered nurses engage with students one-on-one in conversations on a variety of health-related topics, including hygiene and other wellness issues. While registered nurses do not have teaching responsibilities, they may be asked by teachers to speak with students about health and wellness topics. For instance, a physical education teacher may ask a registered nurse to speak to his or her class as part of the physical education curriculum.

According to the job description, each registered nurse must maintain an educational specialist PDE certification, be a Pennsylvania-licensed registered nurse, and maintain statutory clearances. Additionally, registered nurses are expected to serve as a resource to facilitate learning of positive health and wellness behaviors for students and staff, develop and coordinate in-service programs for staff on universal health practices, and provide informal health information to students, parents, and staff. Registered nurses interact with teachers on health issues, such as when a teacher, in the course of communicating with parents, needs vaccination information.

There is no evidence in the record that registered nurses have ever temporarily substituted for teachers, counselors, ISD technology developers, or content developers.

Both registered nurses are paid according to the 195-day pay scale.

iii. Content Developers

Currently there are five dedicated content developers working for the Employer. Four are full-time employees, and one is part-time. Three content developers work out of the West Chester location, one works in Murrysville, and the fifth is located in Florida. In addition to the five dedicated content developers, three full-time teachers provide 20 days of content development work for the Employer during the summer. Content developers are supervised directly by Brian Cote in his role as Director of Curriculum, Instructions & Assessment. As with the other full-time positions, content developers work 37.5-hour work weeks.

According to their job description, content developers are expected to collaborate with both teachers and lead teachers to create curriculum aligned to Pennsylvania Core Standards. They serve as content area experts in assigned subjects and stay abreast of the latest educational trends within assigned content areas. They also partner with teachers to assist in the creation and evaluation of classes to maximize student engagement and learning. As part of that collaboration, content developers create and maintain pathways within existing courses to assist teachers with differentiation, and to create and maintain appropriate credit recovery courses.

Content developers do not instruct students or plan how the instruction will be delivered to students; both of those functions are exclusive to teachers. Rather, content developers work with teachers to develop the curriculum that will be used by the teachers to instruct students. They also create assignments, quizzes, and exams that are uploaded into Moodle for the teachers' use.

Like teachers, content developers use the Moodle learning management system. Collaborating with the ISD team, content developers plan, troubleshoot, implement, and evaluate the program of instruction. Additionally, they engage in an ongoing review of learning management system content to assure consistency, accuracy, and functionality across the learning platforms.

The Employer prefers that its content developers have a master's degree in education as well as prior teaching experience. Content developers are expected to maintain a valid Pennsylvania teaching certification. Indeed, each of the Employer's content developers maintains the required teaching certification for their assigned subject matter area, and all are former teachers. Content developers participate in the same professional development opportunities available to the professional staff. They also participate in national, state, and local webinars and workshops specific to their role as content developers.

There is no evidence in the record that content developers have ever temporarily substituted for teachers, counselors, registered nurses, or ISD technology developers.

The four full-time content developers are paid according to the 260-day pay scale.

iv. ISD Technology Developer

There are four ISD technology developers, all of whom work a full-time 37.5-hour week from the West Chester location. They report to both Cote and the ISD coordinator, the latter of whom is an ISD technology developer who has the additional responsibility of coordinating meetings and agendas for the team. The ISD coordinator reports directly to Brian Cote.

ISD technology developers are responsible for taking the work that the content developers design in a curriculum template and uploading it into the Moodle learning management system. ISD technology developers typically have a more technical background, and they must have a thorough knowledge of the Moodle system to ensure all of the curriculum and content in Moodle is functional and can be accessed by teachers and students.

As part of their day-to-day responsibilities, ISD technology developers work with teachers and counselors on issues related to the Moodle system. If a teacher or counselor has an issue with the curriculum or with the grades displayed in Moodle, they can contact an ISD technology developer for assistance via a virtual chat function created for that purpose. While ISD technology developers do not have instructional responsibilities, they can interact with students in virtual offices if students need assistance with Moodle.

Prior to the ongoing Covid-19 pandemic, all Employer staff members participated in a production studio training led by the ISD team. The ISD team provided staff with professional development as it pertained to using the production studio to build instructional content.

There is no evidence that ISD technology developers have temporarily substituted for teachers, counselors, registered nurses, or content developers.

The ISD technology developers are paid pursuant to the 260-day pay scale.

D. Terms and conditions of employment

Prior to the Covid-19 pandemic and mandated work-from-home, all employees in both the agreed-upon and disputed classifications physically worked at the Employer's West Chester and Murrysville locations, and they were subject to the same time reporting policies and badge access systems at their respective locations.

At West Chester, teachers, counselors, registered nurses, content developers, and ISD technology developers have working spaces within 100 feet of each other. There is a large open teaching room with spaces for teachers to work when they are not teaching. The counselor offices and nurses' office are adjacent to the teaching room but on opposite sides of the space. The ISD and content developer offices, which are right next to each other, are approximately 100 feet down a hallway from the counselor offices. All employees in the classifications involved herein share access to two kitchens at the West Chester location.

Employees in both the agreed-upon and disputed classifications share other terms and conditions of employment. The Employer maintains two Employee Handbook and Compensation Plans, one for employees hired for less than 12 months (teachers, registered nurses, and counselors), and a second for employees hired on a 12-month basis (ISD technology developers, content developers, teachers, and counselors). They all have access to the same fringe benefits, with differences based on full-time versus part-time status. All employees involved herein have the ability, based on work performance, to work from home according to their respective Employee Handbook and Compensation Plans.

2. Analysis

A. Legal Precedent

The parties stipulate that employees in the teacher, lead teacher, long-term substitute teacher, counselor, registered nurse, content developer, and ISD technology developer classifications are all professional employees within the meaning of the Act. The parties also stipulate that the Employer does not employ any other professional employees other than those in the above-cited classifications. Petitioner, therefore, seeks to represent a unit of all professional employees employed by the Employer.

Petitioner is not required to seek a bargaining unit that is the only appropriate unit or even the most appropriate unit. The Act merely requires that the unit sought by Petitioner be *an* appropriate unit. *Wheeling Island Gaming*, 355 NLRB 637, fn. 2 (2010), citing *Overnite Transp. Co.*, 322 NLRB 723 (1996); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988). However, "[t]he Board has long held that a unit of professional and/or technical employees separate from similarly situated professional and/or technical employees is not appropriate without a showing of a

community of interest so distinguishable as to warrant the appropriateness of such a unit.” *Pratt & Whitney*, 327 NLRB 1213, 1215 (1999).

The Board’s procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. *Boeing Co.*, 337 NLRB 152, 153 (2001). In determining whether a unit is appropriate, the Board looks at whether the petitioned-for employees have shared interests. See *Wheeling Island Gaming*, supra. A major determinant in an appropriate unit finding is the community of duties and interests of the employees involved. In evaluating the community of interest among a petitioned-for unit of employees, the Board, in each case, must determine:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

PCC Structurals, Inc., 365 NLRB No. 160, slip op. at 13 (2017), citing *United Operations*, 338 NLRB 123 (2002). “[T]he requirements that any appropriate unit have an internal community of interest . . . reference broad principles that are generally applicable to unit determinations.” *Macy West Stores, Inc.*, 32-RC-246415 (May 27, 2020) (not reported in Board volumes).

In weighing the “shared and distinct interests of petitioned-for and excluded employees [...] the Board must determine whether ‘excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.’” *PCC Structurals, Inc.*, supra, slip op. 13, quoting *Constellation Brands U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016) (emphasis in original). Once this determination is made – by applying the Board’s traditional community of interest test – “the appropriate-unit analysis is at an end.” *Ibid.*

B. Application of the law to the facts

i. **Departmental organization and common supervision**

While teachers, counselors, registered nurses, content developers, and ISD technology developers are employed in different classifications, all fall under the Director of Curriculum, Instruction & Assessment umbrella. Moreover, that director has a separate reporting line to the CEO apart from the Director of Special Education, Director of Finance, IT Director, and Student Support Manager, all of whom have direct reports, suggesting that each operates as a separate department. Accordingly, I find that all the agreed-to and disputed classifications, inasmuch as they all fall under the Director of Curriculum, Instruction & Assessment umbrella, share common departmental organization. This factor, then, weighs in favor of finding that the disputed classifications do not enjoy meaningfully distinct interests apart from the teachers.

Furthermore, there is common supervision among some of the classifications. Teachers and counselors both report to either the high school or middle school principal, depending on grade

level and assignment.³² Lead teachers and registered nurses both report to the assistant principal. Content developers and ISD technology developers both report to the Director of Curriculum, Instruction & Assessment, who is the second line of supervision for teachers and counselors, and the third line of supervision for lead teachers and registered nurses.

While there are certainly some differences regarding commonality of supervision, I do not afford much weight to those differences. The Employer agrees that teachers and lead teachers should be included in any unit found appropriate, even though those classifications do not share common supervision. Moreover, teachers share common supervision with counselors, and registered nurses share common supervision with lead teachers. On the basis of these facts, I find that the common supervision factor weighs in favor of finding that registered nurses and counselors do not share meaningfully distinct interests apart from the teachers.

As it pertains to the content developers and ISD technology developers, they share common supervision with teachers and counselors at the second level of supervision, and common supervision with lead teachers and registered nurses at the third level of supervision. On the basis of these facts, I find that with respect to the content developers and ISD technology developers, this factor weighs slightly in favor of finding that they share meaningfully distinct interests apart from the other classifications, but only slightly because the supervisory hierarchy merges at the second level with teachers, who the parties have stipulated should be included in an appropriate unit.

ii. Distinct skills and training

This factor examines whether disputed employees can be distinguished from one another based on duties or skills. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one unit. Evidence that disputed employees must meet similar requirements to obtain employment, have similar job descriptions or licensure requirements, participate in the same employer training programs, or use similar equipment supports a finding of similarity of skills. *Casino Aztar*, 349 NLRB 603 (2007); *J.C. Penney Co.*, 328 NLRB 766 (1999); *Brand Precision Serv.*, 313 NLRB 657 (1994).

Although each of the agreed-upon and disputed classifications have different day-to-day functions, several of the classifications possess many similar skills and training. Teachers, counselors, and registered nurses must maintain the same, or nearly the same, clearances for their respective positions. Teachers and content developers must hold teaching certificates, and the record reflects that some counselors also hold teaching certificates. Similar to those classifications, registered nurses must also be certified by the state. Further, all professional employees have access to the same professional development trainings offered by the Employer.

The record also reflects that with the exception of registered nurses, the agreed-upon and disputed classifications all use the Employer's Moodle learning management system. Teachers,

³² The record is not clear if long-term substitute teachers report to a specific individual, or instead each report to the individual responsible for overseeing the position being filled by the long-term substitute.

counselors, and content developers access Moodle for purposes of viewing content, curriculum, and grades, and ISD technology developers are responsible for ensuring that the Moodle system is functional and operational.

For the foregoing reasons, I find that this factor weighs in favor of finding that the disputed classifications do not share meaningfully distinct interests apart from the agreed-upon classifications.

iii. Distinct job functions and the performance of distinct work, including inquiry into the amount and type of job overlap between classifications

This factor examines whether the disputed employees can be distinguished from one another based on job functions. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one unit. Evidence that employees perform the same basic function or have the same duties, that there is a high degree of overlap in job functions or of performing one another's work, or that disputed employees work together as a crew, support a finding of similarity of functions. *Casino Aztar*, supra.

While it is true that each classification performs discrete functions within the school, there is also evidence of overlap among the classifications. As noted above, teachers, counselors, content developers, and ISD technology developers all work within the Moodle learning management system. Registered nurses and counselors are both involved with processing and maintaining students' medical paperwork for purposes of administering 504 learning plans, and teachers and registered nurses both communicate with parents and students regarding vaccination records and updated health record forms. Similar to teachers, counselors are also required to teach courses to both middle school and high school students, and when doing so, they spend anywhere from 25 to 40 percent of their work week performing teaching-related functions.

Content developers and teachers work together to create and update curriculum content, including assignments, exams, and quizzes; content developers and ISD technology developers collaborate to ensure the content created by the content developers and teachers is appropriately added and functional in Moodle. The record also reflects that three full-time teachers perform content development work during the summer.

Based upon the foregoing facts, I find that this factor weighs in favor of finding that the disputed classifications do not share a meaningfully distinct community of interest apart from the agreed-upon classifications.

iv. Functional integration and contact amongst the classifications

The record is replete with examples of functional integration and contact among the classifications. Functional integration exists when employees' work constitutes integral elements of an employer's production process or business. For example, functional integration exists when all of the employees in the sought-after unit work on different phases of the same product or a single service as a group. *Arvey Corp.*, 170 NLRB 35 (1968); *Transerv Systems, Inc.*, 311 NLRB 766 (1993). Another example of functional integration is when the Employer's workflow involves

all employees in the sought-after unit. Evidence that employees work together on the same matters, have frequent contact with one another, and perform similar functions is relevant when examining whether functional integration exists. *Transerv Systems*, supra.

As noted above, teachers and content developers work side-by-side to develop and create curriculum that comports with Pennsylvania Core Standards. Once the curriculum, content, tests, quizzes, and assignments are developed, ISD technology developers work to make sure that content is appropriately uploaded in Moodle so that teachers, content developers, students, counselors, and others can access and use the information. Each plays a critical role in developing content and curriculum and making that information available to students to support the Employer's educational mission.

In the course of educating students, counselors work with teachers and registered nurses to coordinate schedules, grades, student pathways, and 504 learning plans. Content developers and ISD technology developers play integral roles in developing student pathways, and then making sure those pathways, schedules, grades, and learning plans are functional and operational in Moodle, respectively. Further, all classifications have access to ISD technology developers to troubleshoot any issues that arise in Moodle.

In addition to working closely together, prior to the pandemic, all classifications at the West Chester location—where a majority of the employees work—had working spaces within 100 feet of one another. Teachers worked in a large open room, and the record reflects that counselors spent time in the teacher room daily working alongside teachers. A counselor testified that he connects with ISD technology developers multiple times per week and has contact with registered nurses daily. Registered nurses occasionally are asked by teachers, as part of the teaching curriculum, to speak to students about health- and wellness-related issues. Additionally, all professional classifications connect with each other during professional development programs, and in 2020, prior to the pandemic, many of these classifications participated in weekly department meetings.

For the foregoing reasons, I find overwhelming evidence of functional integration between the classifications involved herein, and find that this factor weighs heavily in favor of finding that the disputed classifications do not share meaningfully distinct interests apart from the agreed-upon classifications.

v. Interchange

Interchangeability refers to temporary work assignments or transfers between two groups of employees. Frequent interchange “may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills.” *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987). Also relevant for consideration of interchangeability is whether there are permanent transfers among employees in the unit sought by a union. However, the existence of permanent transfers is not as important as evidence of temporary interchange. *Ibid.*

The record contains little evidence of interchange among the classifications. As noted above, three full-time teachers do perform part-time content development work during the

summer. However, the record does not contain any evidence of temporary work assignments or transfers between teachers and the disputed classifications. Accordingly, I find that this factor weighs in favor of finding that the disputed classifications share meaningfully distinct interests apart from the agreed-upon classifications.

vi. Terms and conditions of employment

Terms and conditions of employment include whether employees receive similar wage ranges and are paid in a similar fashion, such as hourly; whether employees have the same fringe benefits; and whether employees are subject to the same work rules, disciplinary policies and other terms of employment that might be described in an employee handbook. See, e.g., *Overnite Transportation. Co.*, 322 NLRB 347, 349 (1996).

Employees in the agreed-upon and disputed classifications share nearly identical terms and conditions of employment. All have access to the same fringe benefits, with the only difference arising from the employee's status as full-time versus part-time. Full-time employees in all classifications work 37.5-hour weeks. All are subject to the same time reporting system, have the same badge access to the Employer's facilities, and share the same kitchens and break areas.

Additionally, all employees are salaried and fall within one of two wage scales. They are subject to the same policies, standards of conduct, and rules, and are governed by one of two employee handbooks based solely on whether the employee has a 12-month or less-than-12-month schedule. The handbooks are identical in many respects, such that employees, regardless of work schedule, are subject to identical policies related to disciplinary rules, dress codes, social networking policies, sexual harassment, gifts, hours of work, attendance, and many others. All employees in the agreed-upon and disputed classifications have access to merit-based work-from-home benefits.

Based on the foregoing, I find that this factor also weighs heavily in favor of finding that the disputed classifications do not share meaningfully distinct interests apart from the agreed-to classifications.

On balance, and analyzing the above evidence in its totality, I find that the disputed classifications do not share a meaningfully distinct community of interest separate and apart from the agreed-upon classifications. Specifically, I find evidence of common departmental organization, common supervision in part, similarities in skills and training, job overlap, significant functional integration and contact, and nearly identical terms and conditions of employment. I thus conclude that the petitioned-for unit is appropriate for purposes of collective-bargaining.

CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties stipulated, and I find, that that there is no collective-bargaining agreement covering any of the employees included in the appropriate unit, and there is no contract bar or other bar to an election in this case.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time teachers, lead teachers, long-term substitute teachers, counselors, registered nurses, content developers, and ISD technology developers employed by the Employer at its 1245 Wrights Lane, West Chester, PA and 221 Blue Spruce Way, Murrysville, PA facilities.

Excluding: All office clerical employees, confidential employees, managerial employees, temporary employees, teaching assistants, adjunct teachers, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by 21st Century Cyber Education Association, PSEA/NEA.

A. Election Details

The election will be conducted by mail.³³ The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on Tuesday, May 18, 2021. Voters must return their mail ballots so that they will be received by close of business on Tuesday, June 15, 2021. The mail ballots will be counted on Monday, June 21, 2021 at a time and location to be determined, either in person or otherwise, after consultation with the parties.

³³ The parties agreed at hearing that their preference is to hold a mail ballot election in this case.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region Four office no later than 5:00 pm on Tuesday, May 25, 2021 in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending April 15, 2021, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Acting Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by Wednesday, April 28, 2021. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**³⁴

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

³⁴ The Petitioner waived 7 days of its 10-day entitlement to the voter list.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election that will issue and that accompany this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review in this case may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Acting Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the

request on the other parties and file a copy with the Acting Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: April 26, 2021.

A handwritten signature in black ink, appearing to read "Thomas Goonan".

THOMAS GOONAN
Regional Director, Region Four
National Labor Relations Board